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ABSTRACT

This pamphlet describes, from an administrator's perspective, the advantages and disadvantages of mediation to solve special education disputes between parents and schools. It first notes mediation requirements under the 1997 reauthorization of the Individuals with Disabilities Act whenever a due process hearing has been requested, as well as specific requirements concerning selection of mediators, mediation cost responsibility, and confidentiality. The benefits of mediation are identified, such as mediation is less expensive than due process; mediation is an expeditious process; mediation improves relationships; mediation is less adversarial; mediation is confidential; the mediation process is shaped by parents and educators; and mediation encourages creative solutions. Concerns about mediation include the following: the belief that mediation leads to due process; the concern that mediated agreements will not be implemented; the perception that mediation will not be useful; and the fact that sometimes a due process hearing is the appropriate method to resolve a special education dispute. (DB)

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In 1997, when Congress reauthorized the Individuals with Disabilities Education Act (IDEA '97), they included the requirement that states make mediation available whenever a due process hearing has been requested. Congress recognized that in states where mediation was available, "parents and schools have resolved their differences amicably, making decisions with the child's best interest in mind."

Considering Mediation for Special Education Disputes: A School Administrator's Perspective

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While the State Education Agency is responsible for providing mediation services, the process ultimately depends on the participation of administrators and parents in order to be successful. This pamphlet describes the advantages and disadvantages of mediation from an administrator's perspective in order to help other administrators make an informed decision about whether it is in the best interest of their school district, and ultimately the students they serve, for them to participate.

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What Is Mediation?

Mediation is a process of facilitated negotiation. At the heart of this process is the role of the mediator, a trained impartial facilitator, who assists the school staff and the parents of a child with disabilities in resolving their dispute in an informal setting. The mediator facilitates the discussions, encourages the participants to identify and clarify areas of agreement and disagreement, and helps them to generate and evaluate options for resolution that will be mutually agreeable and that will incorporate their interests. With the assistance of the mediator, the school staff and parents integrate these options into a well-specified and workable solution that is then written into an agreement. When successful, mediation can avert a due process hearing or other more adversarial procedures.

Mediation Under IDEA '97

Mediation that is offered when a due process hearing has also been requested must meet certain requirements under IDEA '97. The regulations at 34 C.F.R. §300.506 include the following:

- Participation is voluntary on the part of the parties.
- Mediation cannot be used to deny or delay the right to a due process hearing or any other rights afforded under Part B of the Act.
- Mediation is conducted by a qualified and impartial mediator who is trained in effective mediation techniques and is knowledgeable in laws and regulations relating to the provision of special education and related services.
- Mediators are selected on a random basis or by mutual agreement of the parties.
- Individuals who serve as mediators may not be an employee of an LEA or SEA that is providing direct services to the child who is the subject of the mediation process and must not have a personal or professional conflict of interest.
- The state shall bear the cost of the mediation process.
- Mediations must be scheduled in a timely manner and held in a convenient location.
- Agreements reached by the parties must be set forth in a written mediation agreement.
- Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings.
- A public agency may establish procedures to require parents who elect not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party who would explain the benefits of the mediation process, and encourage the parents to use the process.

Note: *The section above on Mediation Under IDEA '97 summarizes the mediation requirements found in IDEA '97. The reader is encouraged to contact his or her State Department of Education for information on the full requirements or to visit the CADRE web site at:*
http://www.directionservice.org/cadre/indexidea.cfm.
The information in this paper was not meant to further interpret these regulations but rather to discuss the mediation process in general and show how it may facilitate the collaborative resolution of disagreements between parents and schools.

Benefits of Mediation

There are a number of reasons for local school administrators to participate in mediation. The advantages of mediation include the following:

- **Mediation Is Less Expensive than Due Process.** While costs vary from state-to-state, costs for mediation rarely exceed $1500. A typical due process hearing is far more expensive. Many of the legal costs associated with due process need not apply to mediation. For example, attorneys are not always necessary when mediating. Even when attorneys are involved, mediation is still less expensive than a due process hearing since the preparation of an issue statement, evidence packets, and witness lists are not necessary. If a due process hearing has been requested, the state pays for the mediator and there is no cost to the local agency.

Many states provide free mediation even when there hasn't been a request for a due process hearing.

- **Mediation Is an Expeditious Process.** Unlike due process hearings, which may not occur for months after the initial filing, the mediation process is often completed within 20 to 30 days. Mediations usually only require one or two sessions, particularly if they are convened in the early stages of a dispute before the parties' positions have hardened and anger has grown. Mediations are typically scheduled within several weeks of filing, and the vast majority of disputes are resolved with only one day devoted to mediation.

- **Mediation Improves Relationships.** Special education disputes occur in the context of relationships that will continue into the future. A mediated settlement that addresses both school and family interests often preserves a working relationship in ways that would not be possible in a win/lose decision-making procedure. Because mediation builds on everyone's shared interest in the student being successful, relationships between parents and school personnel are often reconciled and communication is enhanced. Ultimately, parents and educators working well together leads to positive educational outcomes for students.

- **Mediation Is Less Adversarial.** Mediation minimizes the time spent focused on establishing blame and finding fault. Instead, mediation looks into the future to identify the child's needs and how they can best be met. In due process hearings, a third party neutral imposes an outcome on the participants that one or both may be unhappy with. In mediation, agreements are developed by the participants themselves — the school staff and parents craft a collaborative resolution with the assistance of the mediator.

- **Mediation Is Confidential.** The two parties can openly discuss any issue knowing that it will remain confidential and not be admissible in any subsequent legal proceedings. Congress realized the sensitive nature of these disputes when it mandated that the discussions that occur during mediation be kept confidential.

- **The Mediation Process Is Shaped by Parents and Educators.** The parties determine who the participants are, agree on who the mediator will be, decide where and when the mediation sessions will take place, and identify what will be included in any final agreement. The mediator does not impose a decision, and the parties are not required to reach an agreement. Either party may terminate the mediation process at any time. Mediation empowers the two parties and acknowledges their ability to arrive at a decision that reflects the best interests of the child. There are no losers in the mediation process as both parties contribute to the creation of any agreements that are reached.

- **Mediation Encourages Creative Solutions.** Because due process hearings have a narrow focus related to issues of law, hearing officer decisions are necessarily limited. Mediation is much more flexible and allows the two parties to "step outside the legal box" and develop new options that are mutually beneficial. Discussions in mediation may focus on issues of trust, respect and communication that would not typically be addressed in a due process hearing.

Concerns About Mediation

CADRE surveyed state agencies to identify some of the reasons districts may decline to mediate special education disputes. Some of the concerns that emerged are addressed below:

- **The Belief that Mediation Leads to Due Process Hearings.** Mediation does not lead to due process hearings, but rather typically occurs as a result of a due process request. In fact, mediation can be an

effective means of averting due process hearings. Whether due to formal mediation or pre-hearing settlements, very few disputes ever actually get to a due process hearing. In California, for example, mediators were involved in over 95% of all due process filings in 2000. Of the 2,200 due process filings only 82 decisions were published. The balance represents cases that were mediated or otherwise settled prior to hearing.

The Concern that Mediated Agreements Will Not Be Implemented. Participants in mediation have ownership of any agreements that come from having participated in the mediation process, leading to high rates of compliance. In the instances that a participant does not follow through with an agreement, a mediation session can be convened to explore why implementation was problematic and to identify alternative arrangements. Sometimes arrangements for a follow-up meeting may be included in the initial agreement.

The Perception that Mediation Will Not Be Useful. The authors believe that there is always plenty about which to mediate. While agreements may not always be reached, participants in mediation almost always report that the time they devoted to mediation was well spent. Resolving disagreements without litigation means that considerable effort and expense can be avoided. Parties maintain control over both process and outcome and any liability for attorneys' fees can be avoided or reduced. In cases where the issues cannot be completely resolved, mediation can still be valuable in developing stipulations on facts, chronology, and certain issues, which can streamline the eventual hearing.

Sometimes a Due Process Hearing Is the Appropriate Method to Resolve a Special Education Dispute. Mediation is a process that depends in large part on the good will of the parties in order to succeed. If reasonable discussion is not possible, mediation may not be the answer. It must also be acknowledged that sometimes, reasonable people may truly care about a child's needs yet disagree about how to meet those needs, and may require the definitive resolution of a hearing decision. Even in these cases, mediation can provide significant benefits prior to a hearing.

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